No. 4312

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit.

GLEN FULKERSON,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

PETITION OF PLAINTIFF IN ERROR FOR REHEARING.

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PETITION FOR REHEARING.

Having carefully examined the opinion of the Honorable Court, I think that, with propriety, we may ask the Court to consider whether this case is not one in which it will be proper to grant a rehearing to the appellee, on the grounds:

E. The Court's instructions to the jury were, in part, an argument to them, when he stated that "If you believe that a man could be on the police force in Seattle for three years and have a flask like that passed on him, with that color of contents,—a man on the police force, and not knowing it was whiskey or prohibited spirits provided by the Volstead Law and the Prohibition

Amendment, then you must conclude that way, because it is for you to determine what the fact is. Now, I don't want you to conclude from any opinion you may think I have of the facts. I don't believe a word of it, myself; I believe he knew what was in the bottle."

This constitutes a dangerous precedent, if the trial court is permitted to argue to the jury on the facts, and if persisted in, would prevent a defendant from obtaining a trial by jury, the Court's argument being a closing for the Government, and an invasion of the duties of the prosecutor, with the jury weighing his very word, to be swayed and swerved from a consideration of all of the facts because of the emphasis the Court places on only the facts which are unfavorable to the defendant, and overlooking entirely those that are in his favor, precluding the jury from considering all of the evidence, but giving weight only to that which is emphasized by the Court.

2. The Court did not pretend to give a fair statement of the facts, but instead presented to the jury in his instructions, the Government's case, overlooking entirely the defense's testimony, and while it was not necessary for the Court to make a statement of the evidence to the jury, but if he was going to make a statement, and in conclusion express an opinion, the cases are agreed that it should be a fair statement of all the evidence, and not one that would favor either side, and this is particularly true where the facts are disputed as they were in this case, and where, as in this case,

the facts were in sharp conflict, the Court's statement of only certain of the facts to the jury of a part of the evidence, which was all in its character an argument, and with the statement that so far the testimony harmonized, and then the Court's proceeding to argue the case with the statement, that "If you believe that a man could be on the police force in Seattle for three years and have a flask like that passed to him, with that color of content,—a man on the police force, and not knowing it was whiskey or prohibited spirits provided by the Volstead Law and the Prohibition Amendment, then you must conclude that way, because it is for you to determine what the fact is. Now, I don't want you to conclude from any opinion you may think I have of the facts. I don't believe a word of it myself; I believe he knew what was in the bottle." The trial court did not only give the jury his opinion of the evidence, but argued to them the Government's case. It is the attempt to have the Court separate the law from the facts and leave the latter in unequivocal terms for the judgment of the jury as their true and peculiar province, and I can find no case supporting the Court arguing to the jury the facts peculiarly favorable to the Government.

Instead of the Court's instructions to the jury being submitted calmly and impartially, the instructions of the kind here complained of, were submitted with emphasis and vehemence, that creates an atmosphere that makes the instructions all one-sided, and that which makes in favor of the de-

fendant is not suggested as in this case, that the defendant happened to be in the premises in question, by reason of the fact that the defendant, while living with his family consisting of a wife and four children, at 322 Mercer Street and a member of the police force for three and a half years, had in addition to his occupation as a policeman, been working as a doorman at the Hipprodome; that he had rented the room in the apartment in question, for fifteen dollars a month, from a Mrs. Nulph, and that he did not know his codefendant, Mrs. Miller; that on the occasion in question, he had received a check for one-half month's pay from the police department, which, being short, the Captain told him to see the Commissioner and have it fixed; that he did so, and then went to his room to get his things; that on the first of the month he had started working nights, at which time his beat was changed to Washington Street in another neighborhood, and not convenient to the premises where he had rented the room; that his room rent had been paid up to the first of the month, but he had never taken his things away, and August 30th was the last time he had been there previous to his arrest; that on September 10th he went to the room only to get his clothes and things he had left there; that his wife, brother and sister were out in front of the building in a car waiting for him to return; that his things consisted of a uniform worn on the afternoon shift, and other clothing; that he had a key to the outside door, as had also the other tenants, there being

two or three in each flat; that while he was in the hall a woman, whom he afterwards ascertained to be Mrs. Miller, came from another room and said, "Here is this bottle of yours; it ought to be pretty good for your rheumatism," to which he replied, "I don't know anything about it," and that she looked at him and said, "Where did you come from?" to which the defendant responded, "I came from the lavatory," and she then said, "You just hand it to them," and she opened the door of the front room and defendant stepped in, where he found two men, and handed one of them the bottle, who gave the defendant some money and the defendant asked the man what it was for, and he replied, "For the bottle"; that the witness turned around to look for the girl, but that she was gone, and the men then said they were federal officers, and put the defendant under arrest. The defendant also denied the testimony of the two officers given against him, and said that the officers handed him a five dollar bill and said, "Here, give this to the girl."

In addition to the cases already cited in our brief, there is a recent case which has just been handed down by the Circuit Court of Appeals for the Eighth District, in Weare vs. United States, Vol. 1, 2d Ed. Fed. Rep. 617, which completely digests the question hereby presented. As to the question raised by the error assigned to certain portions of the charge of the Court on the ground that the same were argumentative, in part says:

"It is the well-established rule in the United States Courts that the Judge may comment on the evidence and may express his opinion on the facts, provided he clearly leaves to the jury the decision of fact questions. Little vs. United States (C. C. A.), 276 Fed. 915; Savage vs. United States (C. C. A.), 270 Fed. 14, Lovejoy vs. United States, 128 U. S. 171, 9 Sup. Ct. 57, 32 L. Ed. 389; Simmons vs. United States, 142 U. S. 148, 12 Sup. Ct. 171, 35 L. Ed. 968; Allis vs. United States, 155 U. S. 117, 15 Sup. Ct. 36, 39 L. Ed. 91; Johnson vs. United States (C. C. A.), 270 Fed. 168; Oppenheim vs. United States, 241 Fed. 625, 154 C. C. A. 383; Dillon vs. United States (C. C. A.), 279 Fed. 639; Starr vs. United States, 153 U. S. 614, 14 Sup. Ct. 919, 38 L. Ed. 841; Horning vs. District of Columbia, 254 U. S. 135, 41 Sup. Ct. 53, 65 L. Ed. 185.

"The instructions, however, should not be argumentative. The Court cannot direct a verdict of guilty in criminal cases, even if the facts are undisputed. Dillon vs. United States (C. C. A.), 279 Fed. 639. It should not be permitted to do indirectly what it cannot do directly, and by its instructions to in effect argue the jury into a verdict of guilty. We refer to some of the decisions on this question.

"In Rudd vs. United States, 173 Fed. 912, 97 C. C. A. 462, this Court, in an opinion by

Judge Hook, referring to judges commenting on the evidence, said, 'His comments upon the facts should be judicial and dispassionate, and so carefully guarded that the jurors, who are the triers of them, may be left free to exercise their independent judgment.'

"In Sandals vs. United States, 213 Fed. 569, 576, C. C. A. 149, 156, the Court reversed the case and says: 'The jury is naturally sensitive to the Court's expression of opinion concerning the issues of fact in any case.'

"In Hickory vs. United States, 160 U. S. 408, 16 Sup. Ct. 327, 40 L. Ed. 474, the Court referred with approval to the doctrine of Starr vs. United States, *supra*, and stated there were certain limitations on the power of a federal Judge when instructing a jury and commenting on the facts, 'limitations inherent in and implied from the very nature of the judicial office.'

"In Reynolds vs. United States, 98 U. S. 145, 168 (25 L. Ed. 244), the Court said, 'Every appeal by the Court to the passions or the prejudices of a jury should be promptly rebuked; —it is the imperative duty of a reviewing court to take care that wrong is not done in this way.'

"In Foster vs. United States, 188 Fed. 305, 310, 110 C. C. A. 283, 288, the Court said: 'The greatest caution should be used in the exercise of this power.'

"In Mullen vs. United States, 106 Fed. 892, 46 C. C. A. 22, the thought was emphasized that the Court could only express its opinion on facts when based on evidence in the case. Other instances where the Court reversed the case on account of the language of the trial judge being argumentative are Breese vs. United States, 108 Fed. 804, 48 C. C. A. 36, and Cummins vs. United States, 232 Fed. 844, 147 C. C. A. 38. See also Garst vs. United States, 180 Fed. 339, 103 C. C. A. 469.

"In Stokes vs. United States (C. C. A.), 264 Fed. 18, 25, the question was raised that under the instructions of the Court defendant did not have a fair trial. This Court had before it the claimed unfair instructions, and in recognizing the right of trial judges in federal courts to comment upon the evidence, referred to the possibility of the Trial Court unconsciously so coloring its charge that the jury may be unfairly influenced in favor of one of the parties to the action, and said in holding the charge faulty: 'Where the line must be drawn between comment upon the evidence of facts which is and that which is not permissible indeterminable only by an examination of the language and a consideration of the circumstances of each particular case.'

"Examination of the language of the Court in its instructions in this case leads inevitably

to the conclusion that the exceptions and objections to certain parts thereof were well taken. In reading portions of the instructions, it would be difficult to tell whether one were reading the instructions of a court or the argument of a prosecutor. As a sample of their argumentative nature, we quote the following: 'As I recollect it, when these men were put in jail, one of them put in jail that day and the other one the day before, they were searched. Would such things as that match-box and that tobacco can escape the observation of the investigating officer? If he had any sense at all, wouldn't he have found those things? They wouldn't have to go into a man's shoes to determine whether he had a match-box on his person. If he had it in his shoe, he would have crushed it. They couldn't get that match-box in his shoe. That is my view. Would these things have escaped the searching officer when he searched them before they were put in jail that day? Now, they search them when they put them in jail.'

"Other remarks were made by the court equally objectionable, which it is not necessary to set out. The whole tenor of the instructions was apparently to influence the jury to return a verdict of guilty. It was a palpable attempt to usurp the function of the jury as to fact questions and to impose the will and desire of the

> Court upon it, and to interfere with the independent judgment of the jurors. Under the Constitution one accused of crime is entitled to a determination by a jury of the fact questions involved. The jury can easily be misled by the Court. Its members are sensitive to the opinion of the Court, and it is not a fair jury trial when the Court turns from legitimate instructions as to the law to argue the facts in favor of the prosecution. The Government provides an officer to argue the case to the jury. That is not a part of the Court's duty. He is not precluded, of course, from expressing his opinion of the facts, but he is precluded from giving a one-sided charge in the nature of an argument. *We do not think the error in this case is cured by the mere statement to the jury that they were not bound by his opinion, and that they should follow their own judgment.*

The case was reversed on account of the error in the instructions heretofore pointed out, affecting the substantial rights of the defendant, with directions to grant a new trial.

The Judge, in part, in his instructions in the present case said: "If his relation was that of proprietor in a broad sense; if the relation was as testified to by some of the witnesses on the part of the Government, that he was helping this woman out, who was a widow and has three or four children, and if you believe from all the circumstances and

the testimony developed here that the defendant was the real proprietor, and in possession of the premises, and if these liquors in the kitchen were really his possession, if he was *the directing mind,* —was the *controlling influence* and force with relation to the premises and of these liquors, then you would fine he was in possession of it all.

"Now, then, what is the testimony of the Government? The witnesses on the part of the Government say, that when they went in this Miller woman brought them in some drink, and then they asked for a flask, and she went out and said, 'Wait a minute'; went out with the partially filled flask, and then came back with the defendant; the defendant said, 'That is all right, $5.00 for the bottle and for the two drinks,' and gave the bottle to Mr. O'Hara and took the $5.00.

"Now, the defendant says that he was in the hall, that he did have his coat off, as the officers of the Government say he did; that he did come into the room with the bottle of whiskey in his hand; that he did deliver to one of these men the bottle, and did receive $5.00; now that far the testimony harmonizes. Now, he said that the woman gave it to him; he did not know what it was; told him to give it to the man, and he did it; then the officers came in and they found the $5.00 in his hand, just as the officers testified they did. Now, he was asked whether the bottle was wrapped up, he said no. He said he did not know what was in the bottle.

It is for you to determine the fact. Now if he was in the hall, and if this woman gave him the bottle and told him to deliver it to these men, and he did not know what was in the bottle, and gave it to the men, without knowing what was in the bottle, and got the $5.00 without knowing what was in the bottle, or what he was doing, if you believe that, then he is not guilty, because he didn't know what was in the bottle. If you believe that a man could be on the police force in Seattle for three years and have a flask like that passed to him with that color of contents,—a man on the police force, and not knowing it was whiskey or prohibited spirits provided by the Volstead Law and the Prohibition Amendment, then you must conclude that way, because it is for you to determine what the fact is. Now, I don't want you to conclude from any opinion you may think I have of the facts. *I don't believe a word of it myself. I believe he knew what was in the bottle.*"

The Court, while precluding any statement of the evidence of the defendant as to how he came to be in the place at that particular time and the circumstances under which he was there, and an explanation of his conduct, argued to the jury that the defendant must be guilty.

The learned Judge's instructions stated, that "When courts cease to function properly, then God have mercy upon the people of the United States. Law is a rule of civil conduct prescribed by a su-

perior power, and persons must regulate their conduct with relation to that law. It is a rule by which people shall live, and when they violate that rule why then they must be punished; that is the only way we can have Government, and when courts and juries won't function it will only be a short step to a condition of anarchy. If you believe that the defendant went on the stand and perjured himself with a view of escaping a penalty, you will so conclude." And this in connection with the Court's statement as to not merely what the Judge thought the evidence showed, but certain things he stated as absolute facts, and by the way of argument, which had no other effect than to influence the verdict of the jury.

Finally, I respectfully request that the Court again consider the cases cited in our brief, together with the recent case herein cited.

WHEREFORE, upon the foregoing grounds, this appellee and petitioner respectfully prays this Honorable Court to grant to him a rehearing of said cause.

EDWARD H. CHAVELLE,
Attorney for Appellee and Petitioner.

I, Edward H. Chavelle, counsel for the appellee herein, do hereby certify that in my judgment the foregoing petition for a rehearing is well founded, and that the same is not interposed for delay.

EDWARD H. CHAVELLE.